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Supreme Court of the United States

October Term, 1960

No. 511

HERMAN HOWZE,

Petitioner,

against

ARROW TRANSPORTATION COMPANY and ZURICH INSURANCE COMPANY,

Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACOB RASSNER,
Attorney for Petitioner.

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Supreme Court of the United States

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No.

HERMAN HOWZE,

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ARROW TRANSPORTATION COMPANY and ZURICH INSURANCE COMPANY,

Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 30, 1960.

Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit in this case reported at 280 F. 2d 403.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 30, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. In the absence of a determination that "there is no just reason for delay," as required by Federal Rules of Civil Procedure, Rule 54(b), what is the basis for determining whether the whole case has been adjudicated, and therefore the decision appealable, or whether the determination is subject to review at any time before the entry of judgment adjudicating all the claims, and thus not appealable?

(Had a similar situation been presented to the United States Court of Appeals for the Second Circuit and an appeal taken from the order of August 5, 1959, said Court of Appeals would have dismissed the appeal as prematurely taken).

2. What is the legal concept whereby a determination can be made as to whether or not judicial action dismissing a complaint as against one of several defendants constitutes a final and thus appealable order, by reason of the fact that such dismissal may render the action against the remaining parties academic?

3. Is an action wherein an answer has been filed by impleader of a third party one of multiple claims under the Federal Rules of Civil Procedure, Rule 54(b), or a single cause of action involving multiple parties?

Reasons for Granting the Writ

1. There is conflict of opinion between the decision of the Court below and the decision of the United States Court of Appeals for the Second Circuit in the case of *Luckenbach Steamship Company, Inc.*, third-party plaintiff-appellant v. *H. Muehlstein & Co., Inc.*, third party defendant-appellee; *Ellis Rando et al.*, plaintiffs v. *Luckenbach Steam-*

ship Company, Inc., et al., defendants, decided July 1, 1960, 280 F. 2nd 735.

2. The decision by the Court below has made certification under the Federal Rules of Civil Procedure, Rule 54(b) completely ineffectual.

3. It is important to have a legal basis for distinguishing between judicial action and its legal consequences, particularly as to judge-made rules.

4. To obviate confusion so that unnecessary labor would not be imposed on overworked appellate courts, as Circuit Judge Brown noted in his dissenting opinion in the Court below.

5. To obviate appeals, where several parties are sued, from every possible order—even those that name but some of the parties, so that, again in the words of Circuit Judge Brown in his dissenting opinion in the case at bar "• • • a prudent advocate will not run the risk of outguessing the Court of Appeals on when a many-partied-case is a multiple claim or merely a multiple party-single-claim affair."

Statement

Herman Howze, petitioner, a longshoreman, was injured on the 8th day of October, 1957. He suffered the loss of his left leg while in the employ of Alabama State Docks, in the hold of a vessel known as "Grain Barge ATC 107", owned and operated by Arrow Transportation Company.

Liability as to unseaworthiness was predicated on the fact that one of the cables operating a grain leg or scoop was loose and kinked and not reasonably safe for the purpose intended, in addition to other charges of unseaworthiness.

Negligence was predicated on the fact that the shipowner did not provide Howze with a reasonably safe place to work and reasonably safe gear to work with and about

Petitioner filed a civil action against the shipowner on October 7, 1958. The shipowner, Arrow Transportation Company, answered denying unseaworthiness and negligence and filed a third-party complaint against Zurich Insurance Company on December 19, 1958, the insurance company which had insured petitioner's employer.

On the 5th day of August, 1959, Arrow Transportation Company's motion for summary judgment against Herman Howze was granted.

On the 4th day of December, 1959, a final order of dismissal was entered by the aforesaid District Court.

Within thirty days and on the 28th day of December, 1959, petitioner filed his notice of appeal from the order of final dismissal of December 4, 1959.

It is not disputed that the judgment of the District Court granting Arrow's motion for summary judgment did not contain a certification that "there is no just reason for delay" and "an express direction for the entry of judgment" as required by Federal Rules of Civil Procedure, Rule 54(b) in actions involving multiple claims when final judgment upon less than all the claims is entered.

Zurich's answer to the third-party complaint included a claim against Howze for reimbursement for workman's compensation benefits paid to Howze or for the benefit of Howze by Zurich in the event Howze should recover from Arrow.

POINT I

There is a conflict of decision between the circuits of the United States Courts of Appeal.

There is a conflict of decision by the Court below with the decision by the United States Court of Appeals for the Second Circuit in the case of *Lockheed Steamship Company, Inc. v. H. Muehlstein & Co., Inc., supra*, on the ques-

tion of what constitutes the date of commencement of the running of the time to appeal in a situation as confronted this petitioner.

It is of universal importance to know what date constitutes final disposition of an action involving multiple suits, so as to obviate premature filing and safeguard against late filing of a notice of appeal, and to establish uniformity of decision as to such questions.

POINT II

The decision by the Court below has made certification under the Federal Rules of Civil Procedure, Rule 54(b) completely ineffectual.

Arrow's motion for summary judgment was granted on August 5, 1959.

Admittedly, the judgment of the District Court granting Arrow's motion for summary judgment does not contain a certification that "there is no just reason for delay" and "an express direction for the entry of judgment" as required by Federal Rules of Civil Procedure, Rule 54(b) in actions involving multiple claims when final judgment upon less than all the claims is entered.

Thereafter and on December 4, 1959 the Court entered an "order of final dismissal".

The affidavit in support of Zurich's motion to dismiss the appeal states (which statement is challenged by petitioner) that the order of December 4, 1959 was a mere nullity, the exact words being:

> "Therefore, the District Court's order entered December 4, 1959, whereby it purports to dismiss all of the other actions or claims in this case was a mere nullity as there was nothing whatsoever before the court requiring any action on its part."

Within thirty days after the "order of final dismissal" and on December 28, 1959, petitioner filed his notice of appeal from said "order of final dismissal" of December 4, 1959.

On June 30, 1960, the United States Court of Appeals for the Fifth Circuit before Hutcheson, Brown and Wisdom, Circuit Judges, dismissed the appeal, Judge Brown dissenting.

The action by the Court below renders Rule 54(b) of the Federal Rules of Civil Procedure meaningless, as expressed by Judge Brown in his dissenting opinion in the following language:

> "A complaint followed by an answer and an impleader of a third party defendant is either a 'multiple claim under F. R. Civ. P. 54(b) or it is a single cause of action involving multiple parties. If it is the first, then Rule 54(b) expressly applies. A determination has to be made that 'there is no just reason for delay' otherwise it is 'subject to revision at any time before the entry of judgment adjudicating all the claims.'
>
> If, on the other hand, as the court's opinion seems to imply there was but 'one cause of action' with a party and conditional parties, our prior decisions require that the whole thing await the final action as to all. Nettles v. General Accident Fire & Life Assur. Corp., 5 Cir., 1956, 234 F. 2d 243, with which I did not agree but which now binds me, was almost simultaneous with Meadows v. Greyhound Corp., 5 Cir., 1956, 235 F. 2d 233. In the Meadows case the Court set forth that if it is but a single cause of action involving multiple parties, it is not a multiple claim. So much is that so that a certification under 54(b) is completely ineffectual."

POINT III

The decision by the Court below constitutes a radical departure from established law.

The decision by the Court below is a radical departure from that which appears to be well established law.

The appeal was timely taken.

The correct statement of law is set forth by Circuit Judge Clark in the case of *Luckenbach Steamship Company v. H. Muehlstein & Co., Inc., supra*, in the following language (at page 757):

> "It is believed to be wholly clear that in no event can the action be appealable at this time and upon this subordinate issue of indemnity over. The situation comes within the express terms of F. R. 54(b) as amended in 1948, that in the absence of the determination and direction therein provided for — 'only upon an express determination that unless there is no just reason for delay and upon an express direction for the entry of judgment' — 'any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.' The validity of this rule was upheld in Sears, Roebuck & Company v. Mackey (351 U. S. 427) and Cold Metal Process Company v. United Engineering & Foundry Company (351 U. S. 445). So we have continuously dismissed appeals lacking the requisite determination and direction, late examples being Mull v. Ackerman (2d Cir., June 2, 1960), United States v. Gottfried (2d Cir., April 19, 1960) and G. K. W., Inc. v. Phileo Corporation (2d Cir., 276 F. 2d 928)."

POINT IV

An order subject to revision is not appealable.

Petitioner was cut off from pursuing his legal rights.

The Court below notes that "Howze did not amend his complaint to assert a cause of action against Zurich."

It must be assumed that the learned Court below did not make this comment unless such fact was considered of importance.

Petitioner's time to amend his complaint to assert a cause of action against Zurich had not expired.

Petitioner's time to amend the pleadings or assert a direct claim or cause of action or adopt the impleading petition was still available up to December 4, 1959.

Meglio v. United States Lines, 143 F. Supp. 91.

Zurich's claim against Howze was still in full force and effect until December 4, 1959.

POINT V

Doubt as to judicial intent under circumstances where compliance with Rule 54(b) F. R. C. P. would eliminate uncertainty constitutes an invitation and requirement for innumerable protective appeals, otherwise unnecessary and improper.

The District Court obviously did not consider the order of August 5th dispositive of all matters, as under date of December 4, 1959, the District Court entered an "order of final dismissal".

No attorney would be justified in assuming that an order dismissing an action against one of several defendants constitutes a dismissal against all others.

Such action would require an attorney to usurp the function of a Judge or Jury and prejudge the facts.

Judge Brown has expressed the need for undoing confusion in his concluding paragraphs in his dissenting opinion, as follows:

> "On all tests there were clearly two 'claims' here—the plaintiff's case against Arrow and Arrow's case for indemnity. There may well have been nothing left to the merits of the third party claim but until it was disposed of, it was still pending and an appeal could not be taken to the order of dismissal. Indeed, while it is the sort of question begging problem the law deals with all the time, with the third party complaint undisposed of the order on the main claim was still in the power of the Court. As the Rule states, it was 'not final' to provision at any time.'
>
> I think that where there is a reasonable basis for choice, constructions of this kind are contrary to the purpose of the Federal Rules of Civil Procedure. Since courts seem to have difficulty in undoing confusion engendered by the bifurcational process and at other times seem unable to resist making matters worse, I look with high confidence on the continuing study of the Rules under the direction of the Judicial Conference, 28 U.S.C.A. sec. 331. Judge Maris with his strong supporting committees of distinguished judges and lawyers and scholars will, I hope, marshal the full competence of the bar on pre-odd and amended Rule 54 (b) so that, for a third time, lawyers will lead us out of the wilderness."

The appeal from the order of August 5, 1959 would have been dismissed by the Court of Appeals for the Second Circuit as premature and not from an appeal from a final order.

The question cannot await study by the Judicial Conference.

It is respectfully submitted that this imminent, ever present and of [illegible] importance to require clarification and instruction by the Supreme Court of the United States.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari be granted to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

APPENDIX

Opinion of United States Court of Appeals for the Fifth Circuit

HERMAN HOWZE,

Appellant,

v.

ARROW TRANSPORTATION COMPANY and ZURICH INSURANCE COMPANY,

Appellees.

No. 18290

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

June 30, 1960

Ross Diamond, Jr., Mobile, Ala., Jacob Rassner, New York City, for appellant.

P. A. Gaudet, New Orleans, La., Charles B. Bailey, Jr., Mobile, Ala., for appellees.

Before HUTCHESON, BROWN and WISDOM, Circuit Judges.

WISDOM, Circuit Judge.

The question before us is the applicability of Rule 54(b), Fed. Rules Civ. Proc., 28 U. S. C. A. covering multiple claims, when there is only a single cause of action.[1]

[1] Rule 54(b) provides: "*Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim the Court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. As amended Dec. 27, 1946, effective March 19, 1948."

Herman Howze, appellant, a long-shoreman employed by the Alabama State Docks Department at Mobile, was injured while unloading a cargo of bulk corn from an unmanned barge. Howze sued Arrow Transportation Company, owner of the barge, alleging that his injuries were caused by Arrow's negligence or by the unseaworthiness of the barge.

Arrow answered, denying that Howze's injury was caused by Arrow's negligence or that the barge was unseaworthy. Arrow also filed a third-party complaint against Zurich Insurance Company, the insurer of the Alabama State Docks Department, alleging that at the time Howze was injured the barge was in the exclusive custody and control of the Alabama State Docks Department and that if there was any liability to Howze, only the State Docks Department was liable. Arrow's third-party complaint against Zurich, the insurer, was filed under a policy provision allowing a direct action against Zurich for indemnity for any amounts for which Arrow might be held liable for such accidents as Howze suffered. The prayer in the third-party complaint is in the usual form for indemnity "for such sum, if any, as plaintiff may be awarded against Arrow."

Howze did not amend his complaint to assert a cause of action against Zurich. Zurich answered the third-party complaint, denying liability but asserting the right to be reimbursed for workmen's compensation benefits paid to Howze or for the benefit of Howze in the event Howze should recover from Arrow.

Thus, Arrow's claim against Zurich and Zurich's right to reimbursement from Howze are both conditioned and dependent on the success of Howze's action against Arrow. And, of course, judgment in favor of Arrow would dispose of Arrow's claim against Zurich and Zurich's claim against Howze.

The district court granted Arrow's motion for summary judgment August 5, 1959. Howze filed a notice of appeal December 28, 1959, long after expiration of the thirty day period for appeal provided in Rule 73(a).

Appellant contends that the action involves multiple claims and under Rule 54(b) there was no order of final judgment as to all claims; that the judgment of the district court does not contain a certification that "there is no just reason for delay" and "an express direction for the entry of judgment" as required by Rule 54(b) in actions involving multiple claims when final judgment upon less than all the claims is entered. December 4, 1959, the district court on its own motion entered an "Order of Final Dismissal."

There is no doubt that in a case involving multiple claims a dismissal as to one of the claims without complying with Rule 54(b) does not constitute a final judgment from which the parties may appeal.* But as this case reached us, it was not one involving multiple claims. Had the plaintiff amended his complaint to assert a claim against Alabama State Docks or its insurer, we would have had a complaint involving multiple claims. Here, however, there is only one defendant in the case and that defendant has asserted no claim against the plaintiff. Arrow's claim for indemnity against Zurich is dependent entirely on the possibility of Arrow's being held liable to Howze. It "is so completely incidental to and dependent upon the principal claim that there can be no recovery upon the third-party claim unless the plaintiff prevails on the principal claim."

---

*"This arrangement already has lent welcome certainty to the appellate procedure. Its 'negative effect' has met with uniform approval. The effect so referred to is the rule's specific requirement that for one or more but less than all multiple claims to become appealable, the District Court must make both an express determination that there is no just reason for delay and an express direction for the entry of judgment. A party adversely affected by a final decision thus knows that his time for appeal will not run against him until this certification has been made." Sears, Roebuck & Company v. Mackey, 351 U. S. 427, 76 S. Ct. 895, 900; 100 L. Ed. 1297. See Shipley Corp. v. Leonard Marcus Co., 214 F. 2d 498; District 65, Distributive, Processing and Office Workers Union of N. Y., etc. v. McKague, 3 Cir., 218 F. 2d 153; Wright v. Dumont, 3 Cir., 179 F. 2d 475; Meadows v. Greyhound Corp., 5 Cir., 235 F. 2d 235; Palchon v. Grace Line, 2 Cir., 191 F. 2d 309.

Panichella v. Pennsylvania Railroad Company, 3 Cir., 1958, 252 F. 2d 452, 455. Similarly, Zurich's right to reimbursement for compensation benefits would not arise until there would be a judgment in favor of Howze.

In granting summary judgment in favor of Arrow and in dismissing Howze's complaint, the trial judge decided the only question before him for decision. There was no occasion, therefore, for any further action to render it final under Rule 54(b). *General Time Corp. v. Padua Alarm Systems*, 2 Cir., 1952, 199 F. 2d 351. After the judgment on August 5, 1959, Arrow's claim against Zurich for indemnity and Zurich's right to reimbursement from Howze were moot. There was nothing for which Arrow could be indemnified and no basis for Zurich to be reimbursed by Howze.

The order of December 4, 1959, did not change the legal effect of judgment of August 5, 1959.[3] The August judgment disposed of the case and was the judgment from which Howze should have appealed.[4] In view of his failure to appeal from that judgment within thirty days, this present appeal must be dismissed.

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[3] The order, in part, reads: "The Court having granted on the 4th day of August 1959, the motion of the defendant Arrow Transportation Company for summary judgement, holding in effect that the defendant as a matter of law was entitled to judgment dismissing the complaint against it; and it appearing from the third-party complaint of Arrow Transportation Company, filed herein against Zurich Insurance Company, that the said insurance company was pleaded on the sole ground that 'in the event Arrow is held to have incurred any liability to the plaintiff Herman Howze * * * Arrow is entitled to indemnity from Zurich * * *'; it is now, of the Court's own motion Ordered, Adjudged and Decreed that this cause of action be and it hereby is dismissed on the merits."

[4] "No form of words is necessary to evidence the rendition of a judgment. If the language used by the court clearly evidences the judge's intention that it shall be his final act, it constitutes a final judgment, and when such intention has been so evidenced and the docket entry has been made a final judgment has been pronounced and entered and the time to appeal starts to run. The later filing and entry of a more formal judgment could not constitute a second final judgment in the case nor extend the time to appeal." Erstling v. Southern Bell Tel. & Tel. Co., 5 Cir., 1958, 255 F. 2d 93, 95.

JOHN R. BROWN, Circuit Judge (dissenting).

If I were a lawyer interested in (a) a timely appeal but (b) not imposing unnecessary labor on overworked appellate courts, I would be confused.

A complaint followed by an answer and an impleader of a third party defendant is either a multiple claim under F. R. Civ. P. 54(b) or it is a single cause of action involving multiple parties. If it is the first, then Rule 54(b) expressly applies. A determination has to be made that "there is no just reason for delay" otherwise it is "subject to revision at any time before the entry of judgment adjudicating all the claims."

If, on the other hand, as the court's opinion seems to imply there was but "one cause of action" with a party and conditional parties, our prior decisions require that the whole thing await the final action as to all. *Nettles v. General Accident Fire & Life Assur. Corp.* 5 Cir., 1956, 234 F. 2d 243, with which I did not agree but which now binds me, was almost simultaneous, with *Meadows v. Greyhound Corp.*, 5 Cir., 1956, 235 F. 2d 233. In the *Meadows* case the Court set forth that if it is but a single cause of action involving multiple parties, it is not a multiple claim. So much is that so that a certification under 54(b) is completely ineffectual.

Now we come up with something in between. It is not a single cause of action *a la* Meadows "involving" maybe multiple parties depending on some judicial action somewhere down the line.

What does the lawyer do? He must appeal from every possible order—even those that name but some of the parties. When he does so, the whole case stops—but not the judicial machine. Its wheels spin merrily along. The District Clerk's office is diverted for preparation of the appellate record. It is lodged with the Court of Appeals. Then comes the motion to dismiss. We have many of these every year. *E. g., Jewell v. Grain Dealers Mutual Ins. Co.*, 5 Cir., 1959, 273 F. 2d 422. Sustained as the motion must be,

the case goes back for the "first" trial and a second appeal. A year has generally run out and the statistics reflect the added work.

Conscientious lawyers deplore this. But it is not of their making. And we must acknowledge that a prudent advocate will not run the risk of outguessing the Court of Appeals on when a many-partied-case is a multiple claim or merely a multiple-party-single-claim affair.

To his quandary we now add a new wrinkle. Appealability depends on the legal consequences of a ruling concerning the rights of others as it bears on other parties to the litigation even though they are not named or referred to in the order. Here the Court reasons that since dismissal of Arrow made the third party claim an academic one, the order dismissing Arrow only dismissed Zurich as well.

But just how does one determine this? For example, a complaint in a diversity suit against a servant and his corporate employer as principal carefully restricts allegations of negligence to acts of the servant only so that the corporation's liability is derivative only. The Court, say, on summary judgment, dismisses the case as to the servant. The legal consequence of that ruling is that the corporate principal has no liability. See, *Seaboard Air Line R. Co. v. George F. McCourt Trucking*, 5 Cir., 1960, 277 F. 2d 593. But the case is still on the docket and the corporation appears as a defendant. Was that corporate defendant dismissed though not named? Was the whole case adjudicated? Under the Meadows-Nettles concept it would be a multi-party single cause of action and all would have to await the final gong. But now the parties have to figure out what neither the judge by formal order nor the Clerk by docket entry have revealed in any way.

The legal consequences of a judge's previous holding on the ultimate disposition of the case as to other parties should have no more effect on the parties not specified in the order than would, for example, an intervening authoritative ruling of the appropriate appellate court on a controlling substantive issue.

Sound judicial administration—an element certainly worthy of note as judges construe judge-made rules—ought carefully to distinguish between a judicial action and its legal consequences.

On all tests there were clearly two "claims" here—the plaintiff's case against Arrow and Arrow's case for indemnity. There may well have been nothing left to the merits of the third-party claim but until it was disposed of it was still pending and an appeal could not be taken from the order of dismissal. Indeed, while it is the sort of question-begging problem the law deals with all the time, with the third party complaint undisposed of the order on the main claim was still in the bosom of the Court. As the Rule states, it was "subject to revision at any time."

I think that where there is a reasonable basis for choice, constructions of this kind are contrary to the purpose of the Federal Rules of Civil Procedure. Since courts seem to have difficulty in undoing confusion engendered by the decisional process and at other times seem unable to resist making matters worse, I look with much confidence on the continuing study of the Rules under the direction of the Judicial Conference, 28 U. S. C. A. § 331. Judge Maris with his strong supporting committees of distinguished judges and lawyers and scholars will, I hope, marshal the full competence of the bar on pre-old and amended Rule 54(b) so that, for a third time, lawyers will lead us out of the wilderness.

I dissent.

Judgment

Extract from the Minutes of June 30, 1960.

No. 18299

HERMAN HOWZE,

vs.

ARROW TRANSPORTATION COMPANY and ZURICH INSURANCE COMPANY.

This cause came on to be heard on the motions filed by appellees on April 7, 1960 to dismiss the appeal and was argued by counsel;

ON CONSIDERATION WHEREOF it is now here ordered and adjudged by this Court that the appeal in this cause be, and the same is hereby, dismissed;

It is further ordered and adjudged that the appellant, Herman Howze, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"BROWN, Circuit Judge, dissenting."

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1960

No. 511

HERMAN HOWZE,
Petitioner

versus

ARROW TRANSPORTATION COMPANY et al.,
Respondents

OPPOSITION TO PETITION FOR CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 511

HERMAN HOWZE,

Petitioner

versus

ARROW TRANSPORTATION COMPANY et al.,

Respondents

OPPOSITION TO PETITION FOR CERTIORARI

The Facts

Petitioner, a longshoreman injured while working in the hold of a grain barge owned by Arrow Transportation Company, who received compensation benefits from his employer's insurer, Zurich Insurance Company, filed this action for damages against Arrow.*

Arrow filed a third-party complaint for indemnity against Zurich, which in turn asserted a claim over

* Contrary to the statement on page 3 of the petition for certiorari, liability of Arrow was not predicated on a "loose and kinked" cable, but on exhaustive averments of improper lighting of the hold of the barge (see complaint, paragraphs 6 and 7, and petitioner's deposition and affidavit).

against petitioner, for reimbursement, out of any recovery which he might realize from Arrow, of compensation benefits paid to him.

On August 5, 1959, the District Court dismissed petitioner's action on Arrow's motion for summary judgment, since petitioner's own testimony showed that no unseaworthiness of the barge or negligence of Arrow, had contributed to his injury.*

Almost five months later, petitioner appealed. The Fifth Circuit dismissed the appeal under Rule 73a, FRCP, which provides a thirty-day period for appeals.

Petitioner contends that since the August-5 order of dismissal did not expressly include the third-party complaint or Zurich's claim for reimbursement, the order was unappealable by virtue of Rule 54b, FRCP.

Petitioner also contends that the decision of the Fifth Circuit in this case conflicts with the decision of the Second Circuit in *Luckenbach vs H. Muehlstein & Co.*, 280 F2d 755.

Question Presented

Whether an appeal, taken more than thirty days after entry of an order terminating an entire case by dismissing the plaintiff's complaint, is timely under Rule 54b, FRCP.

---

* As in *O'Leary vs United States Line Co.*, 215 F2d 708 (CA 1-1954), cert. den., 348 US 939, the barge was in the sole custody of petitioner's employer, which was responsible for lighting the hold.

Argument

A

There is no conflict between this case and *Luckenback Steamship Co. vs H. Muehlstein & Co., supra*, as asserted by petitioner.

In the *Luckenbach* case, a third-party complaint was dismissed, leaving the main action still pending. The dismissal of the third-party complaint was held unappealable, absent the determination and direction required by Rule 54b for appealable judgments on less than all of the claims in an action.

Far from raising a conflict between the Fifth and Second Circuits, a prior decision of the Fifth Circuit is to precisely the same effect as the *Luckenbach* case *Employers Liability Assurance Corp. vs. Kahn*, 251 F2d 460 (1958).

But in the case at bar, it was the main action which was dismissed; and since the third-party indemnity complaint and the reimbursement claim were both wholly dependent on recovery by petitioner in the main action, dismissal of the main action necessarily disposed of the claims dependent on it, and terminated the entire litigation.*

* The district court's subsequent entry of an "Order for Final Dismissal", added nothing to its original judgment: "The later filing and entry of a more formal judgment could not constitute a second final judgment in the case, nor extend the time to appeal." *United States vs Schaefer Brewing Co.*, 356 US 227, 233.

B

Petitioner's enigmatic POINT IV is entitled "An order subject to revision is not appealable". However, the argument under this head is not addressed to reviewability of the order, but to the statement in the opinion of the Court of Appeals, that "Howze did not amend his complaint to assert a cause of action against Zurich".

Petitioner apparently seeks so to construe this statement as to intimate that the decision below, in some unexplained way, deprived him of some right of recovery against Zurich, his employer's insurer.

This intimation has no foundation whatever. Petitioner can have no claim against Zurich except possibly for additional compensation benefits. He may, of course, assert such a claim at any time.

For the reasons stated, it is respectfully submitted that this case presents no occasion for exercise of this court's certiorari jurisdiction.

Eberhard P. Deutsch,
Attorney for Arrow
Transportation Company

Deutsch, Kerrigan & Stiles,
René H. Himel, Jr.,
Paul A. Gaudet,
William S. Stone,
Of Counsel

November, 1960

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1960

No. 511

HERMAN HOWZE,

Petitioner,

against

ARROW TRANSPORTATION COMPANY and ZURICH INSURANCE COMPANY,

Appellees.

BRIEF OF APPELLEE ZURICH INSURANCE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

Herman Howze, petitioner, brought a civil action in the United States District Court for the Southern District of Alabama against Arrow Transportation Company for injuries sustained in the hold of a vessel known as "Grain Barge ATC 107", which was owned and operated by said Arrow Transportation Company, appellee herein. Howze was at the time of the alleged injury employed as a stevedore by the Alabama State Docks Department.

Liability of Arrow to Howze was predicated upon allegations of unseaworthiness of the vessel "Grain Barge ATC 107", and negligence of Arrow in failing to provide Howze with a reasonably safe place to work and reasonably safe gear to work with and about.

The answer filed by appellee Arrow to the civil action filed by Howze contained denials of unseaworthiness and negligence on its part. Arrow also filed a third party complaint against Zurich Insurance Company, the insurer of the Alabama State Docks Department, the employer of Howze, under a policy provision providing for a direct action against Zurich inasmuch as the Alabama State Docks Department as a department of the State of Alabama was immune from suit. The third party complaint filed by Arrow against Zurich alleged, in effect, that in the event Arrow was held to have incurred any liabilty to Howze, Arrow was entitled to indemnity from Zurich by virtue of the Alabama State Docks Department's breach of its implied warranty to unload or discharge the cargo of "Grain Barge ATC 107" in a safe manner and/or because plaintiff's alleged injuries were caused by the primary acting and moving negligence of Alabama State Docks Department, and Arrow demanded judgment over and against Zurich for such sum, if any, as Howze may be awarded against Arrow.

Zurich filed an answer to the third party complaint and also included therein a claim against Howze for reimbursement by Howze for workmen's compensation benefits paid to Howze or for the benefit of Howze by Zurich in the event of any recovery from Arrow by Howze.

The third party action by Arrow against Zurich, and the claim against Howze by Zurich were both predicated and conditioned upon there first being a recovery by Howze against Arrow.

On August 5, 1959, Arrow's motion for summary judgment against Howze was granted.

On December 4, 1959, the District Court for the Southern District of Alabama entered an order purporting to be a final order of dismissal, reciting in its order that "The Court having granted on the 4th day of August, 1959, the motion of the defendant Arrow Transportation Company for summary judgment, holding in effect that the defendant as a matter of law was entitled to judgment dismissing the complaint against it; and it appearing from the third party complaint of Arrow Transportation Company, filed herein against Zurich Insurance Company, that the said insurance company was pleaded on the sole ground that in the event Arrow is held to have incurred any liability to the plaintiff Herman Howze * * * (it) is entitled to indemnity from Zurich * * * *."

On the 28th day of December, 1959, Howze appealed to the United States Court of Appeals for the Fifth Circuit. Arrow and Zurich filed a motion to dismiss the appeal on the ground that the order granting Arrow's motion for summary judgment was a final judgment in that it disposed of the entire proceeding, and; therefore, Howze's appeal, coming more than 30 days after the date of this order, came too late.

The motion to dismiss filed by Arrow and Zurich was granted, *Herman Howze v. Arrow Transportation Company and Zurich Insurance Company*, 280 F. 2d 463 (5 Cir. 1960).

ARGUMENT

POINT I

The petition for a writ of certiorari was not filed within the time prescribed by Section 2101(c) Title 28 U.S.C.A.

Section 2101(c) of Title 28, U.S.C.A. provides:

"Any other appeal or any writ of certiorari intended to

bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Copies of the petition for a writ of certiorari were received by counsel for appellee Zurich Insurance Company on October 27, 1960, in an envelope postmarked October 26, 1960. The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed on petition for a writ of certiorari was entered on June 30, 1960, obviously more than 90 days prior to the filing of the petition for a writ of certiorari.

POINT II

Petitioner failed to notify appellee Zurich Insurance Company of the granting of an extension of time within which to file a petition for a writ of certiorari, if such extension of time was in fact granted.

Paragraph 4 of Rule 34 of the Rules of the Supreme Court, 28 U.S.C.A., requires that whenever a Justice has granted an extension of time within which a party may petition for a writ of certiorari it shall be the duty of the party to whom such extension is granted to give all other parties to the proceeding prompt notice thereof. Neither appellee Zurich Insurance Company nor its counsel of record has received any notice from petitioner or his counsel of record to the effect that any extension of time was granted the petitioner, giving to such petitioner additional time within which to file a petition for a writ of certiorari.

POINT III

The petition for a writ of certiorari filed by petitioner fails to comply with the provisions of Rule 23 of the Rules of the Supreme Court, 28 U.S.C.A.

Paragraph 1(b) (ii) of Rule 23 of the Rules of the Supreme Court, 28 U.S.C.A., provides that the petition for a writ of certiorari shall contain the date and terms of any order granting an extension of time within which to file a petition for a writ of certiorari. If in fact such an extension of time was granted to petitioner the petition for a writ of certiorari does not contain the data respecting the order granting this extension required by the pertinent provisions of Rule 23 hereinabove referred to.

POINT IV

The affirmative grounds set out in Points I through V, taken in conjunction with the argument in support thereof, do not present the requisite special and important reasons required by the Supreme Court of the United States for granting of the writ.

Petitioner's Point I is to the effect that there is a conflict of decision between the Circuits of the United States Courts of Appeal.

The decision of the United States Court of Appeals for the Fifth Circuit, review of which is sought by petition for a writ of certiorari here, does not conflict with any decision of any of the other United States Circuit Courts of Appeal, or decisions of this Court.

Petitioner, in his petition at page 4, states affirmatively that there is a conflict of decisions between the Circuits of the United States Courts of Appeal, and as authority

cites the decision of the United States Court of Appeals for the Second Circuit in the case of *Luckenbach Steamship Company, Inc.*, v. *H. Muehlstein & Company, Inc.*, 280 F. 2d 755 (2 Cir 1960), as being contrary to or in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in the instant case.

In *Luckenbach Steamship Company, Inc.* v. *M. Muehlstein & Company, Inc., supra*, the Court of Appeals for the Second Circuit dismissed an appeal from an order dismissing a third party complaint filed by Luckenbach Steamship Company against H. Muehlstein & Company seeking indemnity in the event of adverse judgments, holding explicitly that because there had been no certification by the District Court under the provisions of Rule 54 (b), Fed. Rules of Civil Procedure, 28 U.S.C.A., "in no event can the action be appealable at this time and upon this subordinate issue of indemnity over." Just wherein this decision is in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in the instant case, is not known to appellee Zurich nor does petitioner in his brief enlighten us in this respect in any way.

In the instant case, the question before the Court of Appeals for the Fifth Circuit was the applicability of Rule 54 (b) when there is only one cause of action. There was a motion for summary judgment granted as to the original complaint, not the third party complaint and not on a subordinate issue of indemnity over. The Fifth Circuit held that Rule 54(b) did not apply. The *Luckenbach Steamship Company* case and the instant case do not conflict in any way. They involve completely different questions of law and are similar only in that they both involve third party actions for indemnity over in the event of adverse judgment. In the *Luckenbach Steamship Com-*

pany case the third party complaint was dismissed, in the instant case the original complaint was in effect dismissed as a matter of law. In holding that Rule 54(b) had no applicability, the Fifth Circuit holds in granting the motion to dismiss the appeal:

> "Arrow's claim for indemnity against Zurich is dependent entirely on the possibilty of Arrow's being held liable to Howze. It is so completely incidental to and dependent upon the principal claim that there can be no recovery upon the third party claim unless the plaintiff prevails on the principal claim; . . . Similarly, Zurich's right to reimbursement for compensation benefits would not arise until there would be a judgment in favor of Howze.
>
> "In granting summary judgment in favor of Arrow and in dismissing Howze's complain, the trial judge decided the only question before him for decision."

Petitioner's Point II is to the effect that the decision by the Fifth Circuit in the instant case has made certification under the Federal Rules of Civil Procedure, Rule 54(b) completely ineffectual.

Petitioner has taken a sentence from Judge Brown's dissenting opinion in the instant case completely out of context and sets it forth as a ground for stating that the decision by the Fifth Circuit has made certification under Rule 54(b) completely ineffectual, and apparently, for all purposes, renders Rule 54(b) meaningless. That this is incorrect is readily seen upon examination of the opinion of the Fifth Circuit in the instant case and also Judge Brown's dissenting opinion. The majority opinion simply holds that in a case involving but a single cause of action, when a judgment has been rendered it has the effect of deciding the only question before the court involving that single cause of action. There is no necessity for the certi-

fication required by the provisions of Rule 54(b) for the simple reason that Rule 54(b) does not apply.

In the dissenting opinion, Judge Brown directs his statement, which is quoted by the petitioner, to a case decided by the Fifth Circuit, *Meadows* v. *Greyhound Corp.*, 235 F. 2d 233 (5 Cir 1956), in which it holds that a single cause of action involving multiple parties is not a multiple claim, *ergo*, a certification under 54(b) is ineffectual because inapplicable. Judge Brown then goes on to state that the instant case is, in his opinion, something in between (a single cause of action case with multiple parties and a multiple claims action).

Point III set out on page 7 of the petition is to the effect that the decision of the Fifth Circuit in the instant case constitutes a radical departure from established law. Argument in support of this point consists solely of a repetition of the statement set forth in heavy type under Point III, a statement to the effect that the appeal was timely taken and a quote from the opinion of the Second Circuit in *Luckenbach Steamship Company* v. *H. Muehlstein & Company, Inc.*, *supra*. Petitioner does not set forth what the established law is nor does he deign to point out wherein the Fifth Circuit departed therefrom in the instant case. If the *Luckenbach Steamship Company* case meets petitioner's concept of established law applicable here, and he leaves no alternative but that, petitioner's statement here is wholly without merit for as we have demonstrated hereinbefore, the decision in the instant case and the decision in the *Luckenbach Steamship Company* case are readily reconcilable and, therefore following petitioner's own logic, the decision in the instant case is in no way a departure from established law.

Point IV is to the effect that an order subject to revision is not appealable. For argument in support of this

proposition, petitioner makes several statements, none of which is supported by the citation of any applicable authority.

Petitioner refers to the fact that it is stated in the opinion in the instant case that "Howze did not amend his complaint to assert a cause of action against Zurich", and goes on to state that apparently the court below attributed some importance to this fact, otherwise, no comment thereon would have been made. The foregoing is followed by a statement to the effect that the petitioner's time to assert a direct claim or cause of action or to amend his complaint was still available up to December 4, 1959, and cites as authority therefor, *Meglio* v. *United States Lines*, 143 F. Supp. 91 (D.C. E.D.N.Y., 1956). Again the petitioner has taken a sentence from the opinion of the court below and attempts to attach to it great significance. The quoted sentence, "Howze did not amend his complaint to assert a cause of action against Zurich" is set out in that portion of the opinion of the court below relating to the fact that Arrow's claim against Zurich and Zurich's right of reimbursement from Howze are both dependent upon the success of Howze's action against Arrow and logically a judgment in favor of Arrow would dispose of Arrow's claim against Zurich and Zurich's claim against Howze.

In addition to the foregoing, *Meglio* v. *United States Lines*, *supra*, can hardly be considered as supporting the contention of petitioner that an order subject to revision is not appealable. In this case the District Court for the Southern District of New York was called upon to consider the alleged failure of a libelant in an admiralty action to comply with the relevant portions of Rule 56 of the Admiralty Rules, 28 U.S.C.A. The instant action is not in admiralty but is a civil action and one to which the Admiralty Rules do not apply.

Petitioner concludes his argument under Point IV with the statement that Zurich's claim against Howze was still in full force and effect until December 4, 1959. While petitioner does dot exactly so state, we assume that he also takes the position that Arrow's claim against Zurich was still in full force and effect until December 4, 1959. Neither of these two contentions is correct inasmuch as both the claim of Arrow against Zurich and Zurich against Howze were conditioned and wholly dependent upon there first being a recovery by Howze against Arrow. If Howze was not entitled to recover from Arrow, as the District Court so held on August 5, 1959, in granting Arrow's motion for summary judgment, then Arrow was not entitled to recover from Zurich and Zurich was not entitled to recover from Howze. There were no claims left pending after the order granting the motion for summary judgment on August 5, 1959; the District Court had decided all of the questions before it for decision and had disposed of all the questions presented in the action.

Point V consists of a statement to the effect that doubt as to judicial intent under circumstances where compliance with Rule 54(b) F.R.C.P. would eliminate uncertainty constitutes an invitation and requirement for innumerable protective appeals, otherwise unnecessary and improper. As argument in support of this broad generality, petitioner points out that the District Court entered an order of final dismissal on December 4, 1959, and goes on to state that no attorney would be justified in assuming that an order dismissing an action against one of these defendants constituted a dismissal against all of them.

In answer to the contention that no attorney would be justified in assuming that an order dismissing an action against one of several defendants constituted a dismissal against all others, we simply state that there was no order

here dismissing an action against one of several defendants. There was one plaintiff and one defendant against whom the plaintiff stated one cause of action and in granting the motion for summary judgment the court decided against the plaintiff, petitioner here, on his asserted cause of action. As the court below holds in the majority opinion, there was only one defendant in the case and only one cause of action. Therefore, an order of dismissal as to this defendant would of necessity constitute a dismissal of the entire action and the side or subsidiary issues raised therein.

Petitioner simply failed to appeal at the proper time and is now seeking to make up for his error.

Petitioner then goes on to state that the Second Circuit would have dismissed an appeal from the order granting the motion for summary judgment and disposing of all the questions involved, and again cites no authority for this conclusion whatsoever. The Second Circuit obviously was not called upon to decide this question, nor has it or any other Circuit rendered a similar decision on similar facts. However, as we demonstrate hereinafter, the decision in the instant case is more than amply supported by decisions of this Court as well as those of the Circuit Courts of Appeal. Perhaps petitioner is seeking to bolster his contention that there is a conflict between the decision of the Fifth Circuit in the instant case and the decision of the other Circuits, particularly the Second Circuit, by taking as his premise an assumption that the Second Circuit would have dismissed an appeal from the order granting the motion for summary judgment and therefore the decision of the court below is in conflict with what the Second Circuit might do if presented with the question. Petitioner would certainly create "doubt as to judicial intent" if this sort of argument were to prevail.

Petitioner here would have this court decide a question of law on which there is conflict not between Circuit Courts of Appeal but within one Circuit, the Fifth Circuit. The only authority cited by petitioner which might be deemed applicable is Judge Brown's dissenting opinion, and even Judge Brown recognizes that the instant case is unique in that in his opinion it comes somewhere in between one involving multiple claims under Rule 54(b) and one involving a single cause of action with multiple parties.

POINT V

The petition for a writ of certiorari fails to affirmatively establish the requisite special and important reasons for the granting of same.

Parargaph 1 of Rule 19 of Supreme Court Rules, 28 U.S.C.A., provides that a review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are "special and important reasons therefor." The category of "special and important reasons" has been held to be those which "imply a reach to a problem beyond the academic or episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L. ed 897, 75 S. Ct. 614 (1955).

Petitioner asserts nothing in the petition for a writ of certiorari which comes within the category of special and important reasons for the granting of same. Indeed, as we have demonstrated hereinbefore under our Point IV, the petition for a writ of certiorari and the grounds asserted therein in support of the petition when distilled down to what could be considered as the essence of the petition, say simply that the petitioner thinks that the Court of Appeals for the Fifth Circuit has rendered a decision which conflicts with those of other Circuit Courts

of Appeals, but is unable to point out any decision of any other court which conflicts, and, furthermore, that the Fifth Circuit has ruled against us, and, therefore, it is wrong, without being able to offer any authority in support of such contention.

This court states that the category of special and important reasons impliedly means those which reach to a problem beyond the academic or episodic, *Rice v. Sioux City Memorial Park Cemetery, Inc., supra*, and none of the reasons given by the petitioner in the petition for a writ of certiorari attain even a reach to a problem which could be considered more than academic or episodic, much less reaching beyond.

For reasons unbeknownst to us, petitioner failed to appeal from the order granting the motion for summary judgment, and now having erred, seeks to rectify his mistakes by asserting that this matter presents a problem of such significance as to require review thereof by this court. We must insist that not only is such not the case here, but that in all respects the decision of the Court of Appeals for the Fifth Circuit in the instant case is correct, as we shall demonstrate hereinafter.

POINT VI

The decision of the Court of Appeals for the Fifth Circuit is correct, and there is no necessity for review thereof by the Supreme Court.

In the instant case, the Fifth Circuit holds that in a case involving a single cause of action between one plaintiff and one defendant there is no field of operation for the provisions of Rule 54(b) of the Federal Rules of Civil Procedure, Title 28 U.S.C.A., inasmuch as by its terms Rule 54(b) applies to actions involving multiple claims,

The term "claim", as used in Rule 54(b) providing for entry of final judgment on one or more, but less than all of the claims on the express determination that there is no just reason for delay, is defined as meaning "a cause of action," *School District 5* v. *Lindgren*, 259 F. 2d 101 (9 Cir. 1958), and *Smith v. Benedict*, 279 F. 2d 211 (7 Cir 1960).

Howze filed a claim against Arrow, asserting a cause of action based upon allegations of negligence and unseaworthiness. Arrow filed a third party complain against Zurich Insurance Company, the insurer of the employer of Howze and under whose supervision and control the vessel on which Howze was injured was being unloaded, asserting a claim against Zurich in the event that Arrow was held to be liable to Howze. Zurich filed a claim against Howze seeking reimbursement for workmen's compensation benefits paid to or for Howze in the event Howze should recover from Arrow.

The complaint of Howze against Arrow asserted a cause of action, and when the court granted Arrow's motion for summary judgment, Howze was held as a matter not to be entitled to recover from Arrow. Inasmuch as Howze had been held as a matter of law not to be able to recover from Arrow, it followed, as it must, that Arrow had no cause of action against Zurich and Zurich had no cause of action against Howze. Arrow could not recover from Zurich until Howze had a judgment against Arrow and Zurich could not recover from Howze until Howze had a judgment against Arrow. Therefore, when Howze was held not to be able to recover from Arrow, Arrow had no cause of action against Zurich and Zurich had no cause of action against Howze. Both were so completely incidental to and dependent upon the principal claim that there could be no recovery thereon unless the plaintiff

prevailed on the principal claim, *Panichella* v. *Pennsylvania Railroad Company*, 252 F. 2d 452 (3 Cir 1958).

Admittedly, the District Court did not spell out that by entering an order granting the motion of Arrow for summary judgment that the court was also disposing of the then moot third party complaint of Arrow against Zurich and Zurich's claim against Howze. However, "no present statute or rule (requires a judgment to be contained in a separate document or so labeled), and the decisional law seems settled that 'no form of words . . . is necessary to evidence (the) rendition of a judgment'." *U.S.* v. *Schaefer Brewing Company*, (356 US 227, 2 L ed 2d 721, 78 S Ct 674 (1958). See also *Erstling* v. *Southern Bell Telephone and Telegraph Company*, 255 F. 2d 93 (5 Cir 1958), wherein the Fifth Circuit stated:

> "No form of words is necessary to evidence the rendition of a judgment. If the language used by the court clearly evidences the judge's intention that it shall be his final act, it constitutes a final judgment . . . The later filing and entry of a more formal judgment could not constitute a second final judgment in the case nor extend the time to appeal."

In *United States* v. *Wissahickon Tool Works*, 200 F. 2d 936 (2 Cir 1952), an order of the District Court stating simply that "Plaintiff's motions for summary judgment are granted with interest and costs" was held to be a final judgment.

The rights of Arrow against Zurich and Zurich against Howze became moot and academic on the granting of the motion for summary judgment. Following this action by the District Court there was only one cause of action involved and only one plaintiff and one defendant, and because there was only one cause of action or one claim,

Rule 54(b), by its terms, was expressly inapplicable to such a situation and there was no necessity for the making of a certificate required by Rule 54(b), in order to render such a judgment final. Rule 54(b), as amended "does not apply to a single claim action." *Sears, Roebuck & Company* v. *Mackey*, 351 US 427, 100 L ed 1297, 76 S Ct 892 (1956). It is applicable by its terms only to separate and distinct claims. *Schwartz* v. *Eaton*, 264 F 2d 195 (2 Cir 1959).

The claim for relief referred to in Rule 54(b) must show that the claimant is "entitled to relief", i.e. the claim for relief must indicate the existence of a cause of action. "Cause of action" in this context means "a claim that facts exist which, under our legal system, are recognized as entitling the claimant to judicial action in vindication of right or in remedying a wrong." *Gold Seal Company* v. *Weeks*, 209 F. 2d 802 (D.C. Cir 1954).

The third party complaint of Arrow against Zurich wholly failed to state a cause of action after the granting of Arrow's motion for summary judgment. Also, Zurich's claim for reimbursement was of no force and effect, as Howze had been held not to be entitled to recover from Arrow. Arrow and Zurich no longer had any cause of action, therefore, they no longer had any claims for relief.

There was no occasion in the instant case following the granting of the motion for summary judgment for any further action on the part of the District Court, for in granting such motion "the trial judge decided the only question before him for decision . . . No occasion for the judge's further action to render it final under Rule 54(b) was presented, since that applies only to an order which adjudicates less than all claims." *General Time Corp.* v. *Padua Alarm Systems*, 196 F. 2d 351 (2 Cir 1952).

Furthermore, in *Town of Oakdale, Virginia* v. *United States*, 198 Fed. 2d 438 (4 Cir 1952), it was held:

> "The condition precedent for the application of this rule, 54(b), is the presence of more than one claim in the action, and where there is only a single claim or 'factual occurrence', the rule cannot be invoked to confer jurisdiction upon an appellate court."

However, if the contention apparently being made by petitioner that multiple claims were involved in the action before the District Court is accepted by this court, the decision of the Fifth Circuit is still correct and reaches the correct result.

Rule 54(b) provides that "When more than one claim for relief is presented in an action . . . the Court may direct the entry of a final judgment upon one or more but less than all of the claims", only on the express determination and certification in the format required by the Rule. Thus, if all of the so-called multiple claims involved in the instant case, assuming for the sake of argument that the third party complaint and the claim of Zurich against Howze assert claims within the meaning of Rule 54(b), it is readily apparent from an examination of the quoted portion of the Rule itself that if all of the claims were disposed of, then there would be no field of operation for the Rule and it would have no applicability. Rule 54(b), as amended, does not apply "to a multiple claims action in which all of the claims have been finally decided." *Sears, Roebuck & Company* v. *Mackey, supra*.

In the instant case, the District Court in granting the motion of Arrow for summary judgment, disposed of not only the "claim" of Howze against Arrow, but also the "claims" of Arrow against Zurich and Zurich against Howze. Having so disposed of all the "multiple claims"

there was no necessity for any certification in accordance with Rule 54(b) in order to make the order granting the motion for summary judgment final and appealable.

Consider the effect of the granting of the motion for summary judgment. Nothing remained to be done except for the petitioner to appeal if he so desired; there was no claim left undecided; and nothing was left pending for further action by the District Court. The District Court did not decide "one or more but less than all of the claims," but decided them all and left nothing pending or remaining to be decided. See Moore's Federal Practice, Vol. 6, Pages 220-221, wherein it is stated:

> The amended Rule (Rule 54(b)) does not . . . require a certificate by the District Court when the court has fully adjudicated all of the multiple claims; that adjudication in itself constitutes a final judgment. And the Rule does not authorize the District Court by certificate to make a final partial adjudication of a single claim or several claims. Since in the foregoing situations the Rule is inapplicable and there is, therefore, no warrant for the District Court to make a certificate, a certificate by it will neither add nor detract from the character of the orders; and their appealability, either as an interlocutory or final order, is governed by principles other than those of the amended Rule."

CONCLUSION

Whether considered from the position taken by the Fifth Circuit in the instant case that Rule 54(b) has no application or from petitioner's apparent assertion that Rule 54(b) applies, the decision is correct, and we

spectfully insist that the petition for writ of certiorari should not be granted.

Respectfully submitted,

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